ARGUMENT: REASONS FOR NOT GRANTING THE PETITION

1. The state statutes herein enact a tax and not a mere regulatory fee.

The district court explicitly found that the purpose of these statutes was to raise revenue. *Henderson v. Stalder*, 265 F.Supp.2d 699, 716 (E.D. La. 2003). The district court also explicitly admitted that it was enjoining statutes granting tax exemptions, although it attempted to justify it by saying it was protecting the First Amendment challenge of Keeler. The district court, however, gave too much significance to the mere nomenclature of "fees" used in the statutes.

The use of the "fee" nomenclature does not have any bearing on the matter. Under both state and federal jurisprudence, they are tax statutes. It makes no difference that word *fee* is used in them; it is the reality of what they are and what they are used for that control. "The label affixed to an ordinance by its drafters has no bearing on the resolution of the question," *Home Builders Association of Mississippi, Inc. v. City of Madison, MS*, 143 F.3d 1006, 1010 n.10 (5th Cir. 1998). *See* also *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072 (La. 1983). In *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128 (7th Cir. 1981), the Court held that the Wisconsin Vehicle Registration license "fee" was in fact a tax. The fact that the tax goes to a special highway fund to finance one special purpose does not prevent it from being a tax.

Here, the Louisiana Legislature has imposed the tax under "fee" nomenclature on virtually every motor vehicle owner who resides in the state and uses the state's roads, highways, bridges, streets, and ways.

> "Except as provided in R.S. 47:480, all fees and taxes provided for in this Chapter, including the permit fees, shall be paid to the state treasurer on or before the tenth day of each month following their collection and shall be credited to the account of the state general fund and the state highway fund No. 2, as provided by law."

La. R.S. 47:481. Moreover, the affidavit of Rosemary Fritz (R.App. 12) reveals facts which clearly show that the enjoined statutes are tax statutes of the state of Louisiana. Only the $3.50 administrative fee might be a regulatory fee. All other "fees" are taxes, even if some of the money is appropriated by the Legislature to private organizations which perform services that support the peace, tranquility, welfare, and benefit of the community and society as a whole, as in the U.S. President's "faith-based initiative."

The attempt to rely on state constitutional requirements for the passage of a tax is misplaced; *Audubon Ins. Co. v. Bernard*, *supra*, clearly shows that the Louisiana Legislature does not always obey those provisions when enacting a tax. No plaintiff has challenged these statutes on the grounds that state constitutional provisions were violated; even if they were, the Louisiana Legislature can easily cure the defect by reenacting them in a fiscal or special session.

No one in this case refutes that Louisiana has a "plain, speedy, and efficient remedy." *See Home Builders Association of Mississippi*, *supra*, at 1012.

Ultimately, the district court took the regulatory "fee" exception to the Tax Injunction Act and expanded it almost to swallow up the general rule against interference with tax schemes. But the rule of statutory interpretation is the

opposite. The Tax Injunction Act is to be construed *broadly* to prevent precisely such disruption of the state's tax scheme (including varying measures of assessment); accordingly, the regulatory "fee" exception is to be construed narrowly to give effect to the Tax Injunction Act. It must be limited to true regulatory fees imposed by an agency to defray the costs of agency regulation itself (not other more general or specific purposes, as is the case here). For example, the regulatory fee exception in the case of *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000) should be limited to situations where the statute itself, unlike the enjoined statutes in this case, *explicitly* provides that the monies raised are to defray the costs of the regulatory program itself.

2. The state statutes in this case are revenue-raising statutes which meet the criteria of a tax.

The special fees are taxes imposed by the Legislature on all vehicle owners whose vehicles drive the state's highways, streets, and ways. And they are collected by a regular tax collection agent of the state with respect to registration of motor vehicles. *See*, for example, La. R.S. 47:303(B)(1), which makes the Motor Vehicle Commissioner (the assistant secretary of public safety, motor vehicles) the express statutory agent of the Secretary of the Department of Revenue and Taxation (who is also the "Collector of Revenue") for the collection of sales and use and other taxes connected with the registration of motor vehicles.

The regulatory scheme in this case is of identification of ownership of vehicles driven on the state's highways, streets, and ways; that regulatory scheme is accomplished

through the license plate registration program, wherein the owners of such vehicles must register their vehicles, obtain for each of their vehicles a unique license plate for identification purposes, and pay a fee and taxes in connection therewith. Only the $3.50 administration cost (fee) goes to defray the costs of that regulation and is retained by the Department of Public Safety & Corrections (DPSC) for that purpose. All other "fees" are taxes paid into the state treasury, appropriated by the Legislature, and used for some unrelated purpose for the benefit of the larger society. *See* the *uncontroverted* affidavits of Kay Hodges (R.App. 7) and Rosemary Fritz (R.App. 12) and also La. R.S. 47:481.

The ultimate purpose of these statutes establishing these special prestige license plates is, first, of course, to accomplish the registration license program to identify vehicles driving the state highways, streets, and ways, and to collect an administrative cost of $3.50 (the regulatory fee) and a vehicle registration license tax in connection therewith, but also, second, to give legislative and public recognition to organizations, institutions, causes, and ideas, etc., which benefit the overall society by their existence and their work and to raise state revenue and special funds to support such organizations, institutions, causes, and ideas, etc., so that their work for the ultimate benefit of the overall society might continue. Thus, this purpose is similar to legislative resolutions which are enacted at each session giving public recognition and commendation to certain organizations, institutions, causes, and ideas, etc., and providing that a copy of the resolution be sent to such organizations and institutions for them to display in an appropriate space on their private property. The speech in such resolutions is

quintessential state speech. It has no value except as state speech; if an organization, for example, recognizes and commends itself, such recognition and commendation has little value. But if the recognition and commendation comes from the Legislature and the state, it has great value.

None of these special fees is a "user fee." "If the fee is a reasonable estimate of the cost imposed (on the governmental entity) by the person required to pay the fee, then it is a user fee," *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992). "If it is calculated not just to recover a cost imposed on the [governmental entity] or its residents but to generate revenues that the [governmental entity] can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation," *id.* Accord: *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072 (La. 1983).

The mere fact that the special fee money goes to a special fund for a specific purpose does not prevent it from having the ultimate purpose of indirectly benefiting the public society at large or from being, therefore, a "tax." *Valero Terrestrial Corporation v. Caffrey*, 205 F.3d 130 (4th Cir. 2000); *Club Ass'n v. Wise*, 293 F.3d 723 (4th Cir. 2002) (adopting as its own the district court opinion at 156 F.Supp.2d 599 (S.D. W.Va. 2001)). Thus, such "fees" are taxes. They are certainly not regulatory fees. The state does not *regulate* in these statutes, for example, the Knights of Columbus or the providers of services to women with crisis pregnancies. The special fees go to a special fund within the state treasury dedicated to these special statutory purposes, and the Legislature must appropriate them to these purposes. These special purposes are ultimately – though

indirectly, through the existence and work of these service organizations, institutions, causes, ideas, etc. – intended for the eventual betterment and benefit of the whole society. The only regulatory fee is the $3.50, which the DPSC keeps to defray the costs of producing the license plates, the paper work with the license plates, and the handling and mailing. The special fees, on the other hand, are paid over to the state treasury, along with the basic license fee, and are taxes within the meaning of the TIA.

The alleged voluntariness of paying the special exactions in return for obtaining the special license plate does not prevent the exactions from being taxes. All motor vehicle registration license taxes, including the exactions paid for the basic regular state license plate, depend entirely on the voluntariness of the owner of the vehicle. He does not have to own a motor vehicle. He could rely on public transportation. If he does not purchase a motor vehicle, he will not pay any motor vehicle registration license taxes. The same is true for sales taxes. A prospective purchaser can freely choose not to make the purchase of goods or services; if he chooses not to purchase, he pays no sales taxes. If he chooses to make the purchase, he will pay the sales taxes on the items purchased. It would be entirely incorrect for someone to say that because the purchase is voluntarily made, the sales tax is not really a tax.

3. The Fifth Circuit's ruling in this case does not violate *Hibbs v. Winn*, 542 U.S. 88 (2004).

In *Hibbs v. Winn*, 542 U.S. 88 (2004), the only state provision challenged was one allowing tax credits for contributions made for the benefit of private and religious

elementary and secondary schools. It is imperative to note that, unlike this case, there was no actual enjoining in *Hibbs v. Winn* of a tax or revenue-raising statutory provision in the lower courts. In this case, the district court had actually enjoined state revenue-raising statutes, in violation of the plain mandate given to the lower federal courts by Congress in the Tax Injunction Act.

4. The Fifth Circuit's ruling in this case follows the plain wording of the Tax Injunction Act (28 U.S.C. §1341).

It must be remembered that the district court actually enjoined state revenue-raising statutes. The Tax Injunction Act says plainly,

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The district court in this case enjoined the collection of the motor vehicle registration license taxes enacted in the special prestige license plate statutes of the State of Louisiana. Such an injunction violates the plain wording of the statute. The statute, in this respect, is clear and unambiguous, and there is no need to make inquiries into legislative history in an attempt to make the statute say what it does not say. For example, there is no condition mentioned whatsoever in the statute that the plaintiff must be taxpayer. Who the plaintiff is and what the case is about is irrelevant to the plain wording of the statute; the lower federal courts have been prohibited by Congress from enjoining the collection of a state tax, where a plain

and speedy remedy is available in the state courts. Petitioners can always bring their claims in state court and litigate all the way up to this Honorable Court. The State of Louisiana offers the full panoply of actions and remedies to its litigants.

5. This case does not involve a forum for private speech but only the governmental speech of the state legislature and, therefore, of the state.

As explained hereinabove, the ultimate purpose of these special prestige license plates is for the State of Louisiana to give public recognition and commendation to certain organizations, institutions, causes, and ideas, etc., whose existence and work has had a beneficial effect on the society as a whole and to raise revenue to support the continued existence and work of these organizations, institutions, causes, and ideas, etc., for the ultimate benefit of the whole society. In this sense, these special prestige license plates are like some of the legislative resolutions which are adopted at each legislative session and which give public recognition and commendation to certain organizations, institutions, causes, and ideas, etc. Some of these legislative resolutions from the 2003 Regular Session, for example, include HCR 5 recognizing and commending the Public Administration Institute Student Association at LSU, HCR 33 recognizing the societal significance of the Ponchatoula Strawberry Festival, HCR 118 giving public recognition and commendation to the Louisiana Workforce Commission, HCR 129 recognizing and commending foster parents, HCR 134 recognizing and commending the First Baptist Church of Bossier City for 100 years of service and contribution both to its membership and to the entire Bossier City community, HCR 151

recognizing and commending the Parents Resource Institute for Drug Education, SCR 40 giving public recognition and commendation to McIlhenny Company and Paul McIlhenny for their supportive actions to promote America's Wetland Campaign to Save Coastal Louisiana, and SCR 69 giving public recognition and commendation to WAFB-TV for its 50 years of broadcasting service and other contributions to the Baton Rouge community. These legislative resolutions comprise only a small sampling of such resolutions adopted by the Louisiana Legislature; all of them are available on the official website of the Louisiana Legislature ("http://www.legis.state.la.us/") where the state legislature has officially published them (and this Honorable Court may take judicial notice of them).

As explained above, such resolutions are quintessential state speech and only have value as state speech. They are the speech of the Legislature, which adopted them as their own resolutions, and, therefore, of the state. The same is true for the messages on these special prestige license plates. For example, the Legislature could enact a statute authorizing a special prestige license plate giving public recognition to the Public Administration Institute Student Association at LSU (*cf.* HCR 5 above) or recognizing the Ponchatoula Strawberry Festival (*cf.* HCR 33 above). And in the same way, the public recognition has value only because the special prestige license plate is the speech of the Legislature and, therefore, of the state.

Even though a suitable copy of the legislative resolution is sent to the chief executive officer or chief protagonist of the organization, institution, cause, or idea, etc., for it to be displayed on the private property thereof, it remains, of course, the speech of the Louisiana Legislature

and, therefore, of the state. The same is true for the special prestige license plates. Even though they are placed on privately owned vehicles, the messages on the license plates themselves remain the speech of the Legislature (and sometimes of the state's executive officer, Kay Hodges, who exercises final editorial control over what is finally published on such plates) and, therefore, of the state.

Indeed, the district court's view that the contention of state speech is defeated when final editorial control rests with a state executive officer instead of the state Legislature is illogical. With final editorial control vested in a state executive officer, the publication on the special prestige license plates is assuredly state speech. The record is barren of any evidence showing that there is a "group effort" (private persons and the state executive officer) in the exercise of final editorial control or that anyone other than the state executive officer exercises it, and the affidavit of Kay Hodges (R.App. 9) stating that only she, and no one else, has final editorial control cannot, especially on a summary judgment motion urged by the opposing party, be sophistically construed to say so, when it does not.

Keeler attempts to distinguish military posters and Environmental Protection Agency books, papers, and posters published and sold by the Government Printing Office (GPO) by arguing that a private purchaser of those items can add his own private speech thereto, while he cannot do so to these special prestige license plates. This argument does not help Keeler or support her contention. If a private vehicle owner cannot change the message on the special prestige license plate that he has obtained, it

means ever more strongly that such message on the special prestige license plate is that of the state and not the private vehicle owner, who, of course, could change his own private message any way he desires.

Keeler and the district court rely on the four-part test used by the three-judge panel in *SCV v. Comm'r, Va. DMV*, 288 F.3d 610 (4th Cir. 2002) to determine who was the speaker of the expressions found on Virginia's special license plates. The Fourth Circuit had to admit that the U.S. Supreme Court has never approved that four-part test nor does every circuit court of appeals. *Id.*, 288 F.3d at 618. It also admitted that there is controversy surrounding the scope of the governmental speech doctrine, *id.*, especially by jurists who disagree with the U.S. Supreme Court's establishment of it. Nevertheless, it was the duty of the circuit court of appeals not to undermine the governmental speech doctrine but rather to follow U.S. Supreme Court precedent. Certainly, the four-part test should not be employed or twisted in such a way to circumvent or undermine the governmental speech doctrine, as the instant petitioners now ask this Court to do.

Correctly analyzed, both the central and ultimate purpose of these statutes establishing these special prestige license plates is, first, of course, to accomplish the registration license program to identify vehicles driving the state highways, streets, and ways, and to collect an administrative cost of $3.50 (the regulatory fee) and a vehicle registration license tax in connection therewith, but also, second, to give legislative and public recognition to organizations, institutions, causes, and ideas, etc., which benefit the overall society by their existence and their work and to raise state revenue and special funds to

support such organizations, institutions, causes, and ideas, etc., so that their work for the ultimate benefit of the overall society might continue. Only state officials exercise final editorial control over the content of what is published or not published on special prestige license plates. The literal speaker is the Louisiana Legislature enacting the statutes creating the mandate and core message and the state's executive officer (Kay Hodges) in finalizing the design and publication of the message on the license plates. Any conclusion that the statutes enacted by the Louisiana Legislature and the words, phrases, and language therein – including the core messages to be published on the license plates – is not the speech of the Legislature and, therefore, of the state is erroneous. The Louisiana Legislature bears the ultimate responsibility for the speech, and its members bear that responsibility at the ballot box, as explained by the U.S. Supreme Court in *Webster v. Reproductive Services*, 492 U.S. 490, 511 (1989) (discussing *Poelker v. Doe*, 432 U.S. 519 (1977)).

See also generally *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, Part III, 375-380 (6th Cir. 2006).

6. A true "forum" case would not be defeated by the Tax Injunction Act.

A true "forum" case would not be defeated by the Tax Injunction Act, as feared by petitioners and the dissenters from a denial of a motion for rehearing *en banc* in the Fifth Circuit. Litigants will not be able to disguise a true "free speech" case as a tax injunction case, for the precedent of this Honorable Court in true "forum" cases is that

speech is not to be smothered and enjoined but that more speech is to be added, where needed, to cure the "free speech" violation. Thus, where the state truly creates a forum for private speech, even it involves the exaction of a fee to enter the forum, the statute or other device creating the forum will not be enjoined; other private speakers, besides those private speakers who have entered the forum, will be allowed to enter the forum also on the same terms.

This case did not involve a forum for private speakers. This case only involved governmental speech, with the state legislature enacting statutes to make the expression. The district court, albeit confused, did implicitly recognize that it could not order the state legislature to enact state laws that the state legislature did not wish to enact or to say in those laws that which the state legislature did not wish to say. Hence, the district court enjoined the statutes containing state speech and, coincidentally but importantly, enjoined the collection of the taxes contained in those statutes.

CONCLUSION

The question presented is predicated upon and conditioned upon there having been created a forum for private speech by the mere enactment of laws by the state legislature. But such is not the case. This litigation involves only governmental speech. This case, especially as erroneously presented in the writ petition, is not a good case for attempting to set a precedent. Indeed, there are in the other circuits different cases which better-by-far lend

themselves to precedent, should this Honorable Court decide to set one.

Moreover, the district court's final judgment had actually enjoined the collection of state taxes. Therefore, it was correct and appropriate for the Fifth Circuit to hold that such a judgment exceeded the scope of federal jurisdiction, as it violated the plain and unambiguous words of the Tax Injunction Act.

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

CHARLES C. FOTI, JR.
Attorney General

THOMAS S. HALLIGAN
Assistant Attorney General

ROY A. MONGRUE, JR.
Assistant Attorney General
Counsel of Record

LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, Louisiana 70804
Phone: (225) 326-6000
Fax: (225) 326-6096

STEPHEN A. QUIDD
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, OFFICE OF MOTOR VEHICLES
P.O. Box 66614
Baton Rouge, Louisiana 70896
Phone: (225) 925-6103
Fax: (225) 925-3974

Counselors for Respondents

Louisiana Constitution, Article 3, Section 16

(A) Specific Appropriation for One Year. Except as otherwise provided by this constitution, no money shall be withdrawn from the state treasury except through specific appropriation, and no appropriation shall be made under the heading of contingencies or for longer than one year.

(B) Origin in House of Representatives. All bills for raising revenue or appropriating money shall originate in the House of Representatives, but the Senate may propose or concur in amendments, as in other bills.

(C) General Appropriation Bill; Limitations. The general appropriation bill shall be itemized and shall contain only appropriations for the ordinary operating expenses of government, public charities, pensions, and the public debt or interest thereon.

(D) Specific Purpose and Amount. All other bills for appropriating money shall be for a specific purpose and amount.

(E) Extraordinary Session. Except for expenses of the legislature, a bill appropriating money in an extraordinary session convened after final adjournment of the regular session in the last year of the term of office of a governor shall require the favorable vote of three-fourths of the elected members of each house.

Louisiana Constitution, Article 7, Section 9, Subsection A

Section 9. (A) Deposit in State Treasury. All money received by the state or by any state board, agency, or

commission shall be deposited immediately upon receipt in the state treasury, except that received:

(1) as a result of grants or donations or other forms of assistance when the terms and conditions thereof or of agreements pertaining thereto require otherwise;

(2) by trade or professional associations;

(3) by the employment security administration fund or its successor;

(4) by retirement system funds;

(5) by state agencies operating under authority of this constitution preponderantly from fees and charges for the shipment of goods in international maritime trade and commerce; and

(6) by a state board, agency, or commission, but pledged by it in connection with the issuance of revenue bonds as provided in Paragraph (C) of Section 6 of this Article, other than any surplus as may be defined in the law authorizing such revenue bonds.

Louisiana Constitution, Article 7, Section 10, Subsection D(1)

Appropriations. (1) Except as otherwise provided by this constitution, money shall be drawn from the state treasury only pursuant to an appropriation made in accordance with law. Appropriations from the state general fund and dedicated funds except funds allocated by Article VII, Section 4, Paragraphs (D) and (E) shall not exceed the expenditure limit for the fiscal year.

Louisiana Revised Statutes 32:863.1(C)(1)(a) and (b)

C. (1)(a) If the operator of a motor vehicle is unable to show compliance with the provisions of this Part by displaying the required document when requested to do so, the motor vehicle shall be impounded and the operator shall be issued a notice of noncompliance with the provisions of this Part on a form to be provided by the department. Notwithstanding the provisions of R.S. 32:852(E), such notice may be sent by first class mail. A copy of the notice of noncompliance shall be provided to the towing or storage company and a copy shall be forwarded to the office of motor vehicles within three calendar days after the notice of noncompliance was served. The notice of noncompliance shall serve as notice of administrative hearings rights. In addition, the law enforcement officer shall remove the license plate from the vehicle if the vehicle is registered in Louisiana. The law enforcement officer shall deliver the vehicle license plate to the chief of the agency which employs the officer, or to a person in that agency designated to receive such license plates. In those cases in which a motor vehicle is not impounded, a copy of the notice of noncompliance shall be attached to the vehicle license plate and both shall be delivered to the nearest office of motor vehicles within three calendar days after the notice of noncompliance was served.

(b) The owner of the vehicle shall have three calendar days, excluding Saturdays, Sundays and legal holidays, from the date that the notice of noncompliance was issued to present to the office of motor vehicles proof of insurance coverage or security in effect at the time of the issuance of the notice of noncompliance. If the vehicle was properly insured at the time the notice was issued, any valid license plate shall be returned within forty-eight hours, exclusive

of legal holidays, to the owner of the vehicle at no cost to the owner. However, if the owner fails to provide proof of the fact that the vehicle was properly insured at the time the notice of noncompliance was issued, the chief administrative officer of the office of motor vehicles shall destroy, or shall cause to be destroyed, the license plate removed from that owner's vehicle and shall notify the secretary that the owner of the vehicle is not in compliance with the compulsory liability law. Upon receipt of such notification, the secretary shall revoke the registration of such vehicle.

Louisiana Revised Statutes 47:303(B)(1)

(1) The tax levied by R.S. 47:302A on any such vehicle shall be paid to the vehicle commissioner as the agent of the collector of revenue at the time of application for a certificate of title or vehicle registration license and such tax shall be administered and collected by the vehicle commissioner in compliance with rules and regulations issued by the collector of revenue and in compliance with the law as construed by the collector of revenue. No certificate of title or vehicle registration license shall be issued until this tax has been paid. The collector of revenue shall be the only proper party to defend or to institute any legal action involving the tax imposed by R.S. 47:302A on the sale or use of any motor vehicle, automobile, motorcycle, truck, truck-tractor, trailer, semi-trailer, motor bus, house trailer or any other vehicle subject to the vehicle registration license tax. (R.S. 47:451 et seq.).

Louisiana Revised Statutes 47:481

Except as provided in R.S. 47:480, all fees and taxes provided for in this Chapter, including the permit fees, shall be paid to the state treasurer on or before the tenth day of each month following their collection and shall be credited to the account of the state general fund and the state highway fund No. 2, as provided by law.

Louisiana Revised Statutes 47:505(B)

B. (1) The commissioner shall require the removal of all number plates upon termination of the lawful use thereof by the owner. However, the commissioner may transfer a number plate, as long as the plate remains legible, when a licensee replaces a motor vehicle. At the time the vehicle is replaced, the licensee shall remove the number plate and present it to any office of motor vehicles field office with the appropriate paperwork indicating replacement of the vehicle. The office of motor vehicles shall transfer the plate to the replacement vehicle, and the transfer shall be completed at the time the licensee presents the number plate and the appropriate paperwork. The secretary shall promulgate rules and regulations as are necessary to implement the provisions of this Paragraph, including but not limited to requirements for paperwork indicating replacement of the vehicle and procedure for transfer of number plates.

(2) Any dealer of motor vehicles who receives a previously owned vehicle with the intention of reselling such vehicle shall remove the license or number plate from such vehicle before resale. After the dealer so removes the plate, he shall execute an affidavit attesting to that fact and attach said affidavit to the title and registration. He shall

notify the secretary on a monthly report listing all plates so removed and destroyed. The Department of Public Safety and Corrections, upon receipt of a transfer on such vehicle accompanied by the required affidavit, shall issue a new plate to the new owner in the same manner as if the vehicle had no plate issued to it. The knowing submission of a false affidavit shall be false swearing under R.S. 14:125.

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

AFFIDAVIT OF KAY HODGES,
ASSISTANT SECRETARY,
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, OFFICE OF MOTOR VEHICLES

BEFORE ME, the undersigned notary public, personally came and appeared

KAY HODGES

(sometimes hereinafter referred to as "AFFIANT") who, after being duly sworn, did depose and say:

AFFIANT currently serves as the Assistant Secretary of the Louisiana Department of Public Safety and Corrections, Office of Motor Vehicles.

In her official capacity as Assistant Secretary for the Office of Motor Vehicles, AFFIANT, as delegated to her by the Louisiana Legislature through statutory enactment, including R.S. 36:407 and 36:408 and other laws, possesses the powers and duties to collect from owners of motor vehicles registered in Louisiana the motor vehicle registration tax levied by the Legislature and to establish all official Louisiana motor vehicle registration license plates and to issue them to such owners upon payment of the tax. To the extent a motor vehicle registration license plate statute gives some power or duty to the Secretary of the department, that power or duty is actually exercised by AFFIANT on behalf of the Secretary and the department.

In Louisiana, the Legislature has chosen to determine what is published on official Louisiana motor vehicle

registration license plates and what is not and has delegated only to AFFIANT the authority to establish these license plates and to adopt rule and regulations as to what they may contain. In only R.S. 47:463.2, has the Legislature invited private persons to apply for a motor vehicle registration license plate with numbers and letters of the choice of the owner of the motor vehicle. Even then, the application is subject to rules and regulations promulgated by AFFIANT, which rules and regulations incorporate the criteria supplied by the Legislature in the statute, and also subject to the final approval or disapproval of AFFIANT. It is AFFIANT's understanding that this particular kind of motor vehicle license plate, as provided by R.S. 47:463.2, is not at all involved in *Henderson v. Stalder,* Civil Action No. 00-2237 on the docket of the United States District Court for the Eastern District of Louisiana.

With respect to all other motor vehicle registration license plates, the Louisiana Legislature has retained the determination of what kind of basic, standard license plate and what kind of other non-standard license plate shall be and what maybe published on them. Sometimes the details of what may be contained on the license plate is delegated by the Louisiana Legislature to AFFIANT, who possesses the power to make rules and regulations regarding them, but the Louisiana Legislature always reserves to itself the determination of what those license plates shall be. In no case are private owners of motor vehicles invited to determine what new special motor vehicle license plates or themes thereof there shall be. In this manner, the choice of the special motor vehicle registration license plate is that of the Legislature, and the core message of any such license plate is the state governmental speech and expression of the Legislature.

Even when AFFIANT receives suggestions as to a logo or motto from an organization or entity whom the Legislature wishes to give public recognition by authorizing a special prestige motor vehicle registration license plate for it but does not designate in the statutory law what the logo or motto will be on the license plate, it is only AFFIANT who, under the law, has the final decision and determination whether that suggested logo or motto will be published or not be published on the license plate. In this manner, AFFIANT has the power and duty under law to exercise for the state and for the Legislature the editorial function of what shall be published and not published on the license plate, the editorial function that itself is expressive activity and causes the final license plate always to be state governmental speech.

After AFFIANT collects the motor vehicle registration tax, and after compliance Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Redemption Fund, the AFFIANT turns the funds over to the state treasury from whom it is eventually deposited to appropriate fund in the state treasury. After AFFIANT turns the tax money over to the state treasury, AFFIANT no longer has any control whatsoever over it.

Contrary to the assertions made by the plaintiffs in *Henderson v. Stalder,* Civil Action No. 00-2237 on the docket of the United States District Court for the Eastern District of Louisiana, neither the AFFIANT nor the Secretary, Richard Stalder, administers the entirety of R.S. 47:463.61 but only discrete parts of it. Neither the AFFIANT nor the Secretary, Richard Stalder, has any power whatsoever over the Choose Life Advisory Council, which is a creature of the Legislature and not executively organized within the Louisiana Department of Public

Safety and Corrections. Neither the AFFIANT, nor the Secretary, Richard Stalder, supervises or controls this advisory council and has no power under state law to disband it. Neither the AFFIANT, nor the Secretary, Richard Stalder, have the power under state law to prevent the Choose Life Advisory Council from meeting or performing its functions under the statute. Because the existence and composition of this advisory council is written into the statute as law, only the Louisiana Legislature has the power to abolish or disband it.

With respect to the special "Choose Life" account funds collected by the Office of Motor Vehicles under R.S. 47:463.61 for the "Choose Life Plate," neither the AFFIANT nor the Secretary, Richard Stalder, have any power or duties with respect to the disbursement of such funds. Upon the issuance of a "Choose Life Plate," the Office of Motor Vehicle collects funds which are broken down into the following categories: (1) the administrative fees for the license plate, (2) the motor vehicle registration tax, and (3) the special "Choose Life" funds. The administrative fees are retained by the Office of Motor Vehicles to reimburse the State for the additional cost incurred in the production and issuance of the "Choose Life Plate," the vehicle registration license tax is deposited in the Transportation Trust Fund or the State Highway Fund No. 2, depending upon the type of vehicle registered, and the "Choose Life" funds are deposited in the Choose Life Fund which is a special fund created in the state treasury. Neither the AFFIANT, nor the Secretary, Richard Stalder, have control or power over this third category of funds, once the funds are turned over to the state treasury, and neither the AFFIANT, nor the Secretary, Richard Stalder, have any control or power

to enforce or implement the last sentence of R.S. 47:463.61(F)(2).

It is AFFIANT"s understanding, based on her attorney's advice, that the Choose Life Advisory Council is to formulate merely an advisory recommendation as to the disbursement of the funds to recipients, that the Louisiana Legislature will take such advisory recommendation into consideration, but that it is only the Louisiana Legislature which has the discretion to make a final decision, in the act of appropriations applicable to such funds, as to the precise disposition of the funds and how they are to be disbursed. Neither the AFFIANT, nor the Secretary, Richard Stalder, have any power or duty under state law to enforce or implement any part of R.S. 47:463.61(F)(2)

/s/ Kay Hodges
KAY HODGES

SWORN TO and SUBSCRIBED, this 10th day of June, 2003.

/s/ Michael C. Barron
Notary Public

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

AFFIDAVIT OF ROSEMARY FRITZ,
DEPUTY ASSISTANT SECRETARY, LOUISIANA
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONS, OFFICE OF MOTOR VEHICLES

BEFORE ME, the undersigned notary public,
personally came and appeared

ROSEMARY FRITZ

(sometimes hereinafter referred to as "AFFIANT") who, after being duly sworn, did depose and say:

AFFIANT currently serves as the Deputy Assistant Secretary of the Louisiana Department of Public Safety and Corrections, Office of Motor Vehicles, and acts in the absence of the Assistant Secretary, Kay Hodges, who is currently out of town.

The Assistant Secretary for the Office of Motor Vehicles, as delegated to her by the Louisiana Legislature through statutory enactment, including R.S. 36:407 and 36:408 and other laws, possesses the powers and duties to collect from owners of motor vehicles registered in Louisiana the motor vehicle registration license tax and other fees levied by the Legislature and to establish all official Louisiana motor vehicle registration license plates and to issue them to such owners upon payment of the tax and any other special fees. As a result of complying with the injunction issued by this court enjoining the enforcement of special license plates, the collection of the vehicle registration license tax and the special fees are changed as indicated below:

1. Those special license plate statutes that exempt the owner from paying the regular registration license tax, or any other fee, are now enjoined by the federal court, and as a result of the injunction, require these individuals, formerly exempt from payment of the tax, to obtain a regular license plate and pay the vehicle registration license tax. Such persons include the following:

a. Ex-Prisoner of War, R.S. 47:463.7

b. Disabled Veteran, R.S. 47:463.12

c. Congressional Medal of Honor Winner, R.S. 47:463.13

d. Purple Heart, R.S. 47:463.26

2. Those plates with special fees in addition to the regular registration license tax are now enjoined by the federal court. These special fees are deposited in the general fund, and are not used in connection with the administration laws governing vehicle registrations and license plates. The general fund has lost these fees because of the injunction, such as the following:

a. Ham Operator Plate, R.S. 47:463.3, one time fee of $25.00 at initial issuance.

b. Shiner Vehicle, R.S. 47:463.9, one time fee of $25.00 at initial issuance.

c. Louisiana National Guard, R.S. 47:463.10, one time fee of $25.00 at initial issuance.

d. Street Rod, R.S. 47:463.12, one time fee of $25.00 at initial issuance.

e. Grotto, R.S. 47:463.14, one time fee of $25.00 at initial issuance.

f. Reserve Forces, R.S. 47:463.15, one time fee of $25.00 at initial issuance.

g. Private Shiner, R.S. 47:463.22, one time fee of $25.00 at initial issuance.

h. Retired Firefighters, R.S. 47:463.23, one time fee of $25.00 at initial issuance.

i. Retired La Officer, R.S. 47:463.24, one time fee of $25.00 at initial issuance.

j. Civil Air Patrol, R.S. 47:463.28, one time fee of $25.00 at initial issuance.

k. Professional Firefighter, R.S. 47:463.30, one time fee of $25.00 at initial issuance.

l. College and University, R.S. 47:463.31, royalty fee paid to school every two years for use of insignia, proceeds to be used for scholarships.

m. Knights of Columbus, R.S. 47:463.32, one time fee of $25.00 at initial issuance.

3. Those plates with only a special fee and an exemption from the regular registration license tax with the fee going to the general fund. The special fee was not used in connection with the administration laws governing vehicle registrations and license plates. These people will now pay more. Additionally, the vehicle registration license tax goes to the Transportation Trust Fund or the Highway Fund No. 2, and not to the general fund so general fund dollars will be less because of the injunction, in instances such as the following:

a. Antique, R.S. 47:463.8

b. Old Antique, R.S. 47:463.8

c. Personalized Antique, R.S. 47:463.8.

Consequently, the federal court injunction has enjoined the collection of certain taxes levied by the Louisiana Legislature, has enjoined certain exemptions granted by the Louisiana Legislature from those taxes, has changed the system of taxes that the Louisiana Legislature has established with respect to the motor vehicle registration license tax and license plates and has caused the allocation of state funds to be contrary to the express will of the Louisiana Legislature as indicated in the annual appropriations bill.

/s/ Rosemary Fritz
Rosemary Fritz
Deputy Assistant Secretary
Louisiana Department of Public Safety Corrections,
Office of Motor Vehicles

Sworn to and subscribed before me, this 4th day of August, 2003.

/s/ [Illegible]
Notary Public

No. 05-1222

IN THE
SUPREME COURT OF THE UNITED STATES

DOREEN KEELER; and
PLANNED PARENTHOOD OF LOUISIANA, INC.,

Petitioners,

— v. —

RICHARD L. STALDER, Secretary,
Department of Public Safety and Corrections;
and JOHN KENNEDY, State Treasurer,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

WILLIAM E. RITTENBERG
Rittenberg & Samuel, L.L.C.
715 Girod St., Ste. 200
New Orleans, LA 70130
(504) 524-5555

SIMON HELLER
(*Counsel of Record*)
PRISCILLA J. SMITH
The Center for
Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

Counsel for Petitioners

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Petitioners respectfully submit the following reply brief in further support of their petition for a writ of certiorari.

ARGUMENT

The State Does Not Even Attempt to Counter the Argument That The Rules and Practices of This Court Strongly Favor Granting the Petition to Resolve a Conflict in the Circuits on an Important Question of Federal Law.

Respondents ("the State") do not even attempt to counter the argument made in the Petition that this Court should resolve the split between the court below and the Sixth Circuit in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), *petition for cert. filed*, No. 05-1389 (Apr. 28, 2006), over the applicability of the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, to charges states make for special license plates.[1] Nor does the State make more than a cursory response to Petitioners' argument that the decision of the court of appeals conflicts with this Court's decisions construing the TIA because the court of appeals applied the TIA to bar a suit by parties who are not contesting their own state tax liability. *Hibbs v. Winn*, 542 U.S. 88, 104 (2004) ("[t]hird-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs* . . . were

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[1] The State cites *Bredesen* only once, and then only in its argument that Louisiana's special license plates constitute government speech exempt from First Amendment scrutiny. *See* Resp. Br. in Opp. at 19. *Bredesen* holds that the charges assessed for special license plates are contract payment, not taxes. *See Bredeson* 441 F.3d at 374. *See also* n.3 *infra*; *Sons of Confederate Veterans v. Comm'r, Va. Dept. of Motor Vehicles*, 305 F.3d 241, 246 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc) ("*When a special license plate is purchased*, it is really the private citizen who engages the government to publish his message . . . ") (emphasis added).

outside Congress' purview.").[2] Instead, the State seeks to deflect the Court's attention from the scope of the TIA -- the basis for the decision of the court of appeals -- by launching an extraneous inquiry, laced with false allegations of impropriety by the district court and Petitioners, focussing on (1) the affidavit "evidence" the State submitted to the district court, *see, e.g.*, Resp. Br. in Opp. at 2-3; and (2) the State's argument, not reached by the court of appeals, that the state statutes enjoined by the district court are all instances of pure government speech, *see id.* at 5-7, 15-20. To correct the misimpressions conveyed by the State, we address these two features of the State's brief in opposition below.

1. *The Two "Uncontroverted" Affidavits Filed by the State in the District Court Were Properly Ignored by the District Court (and Petitioners) Because They Assert No Genuine Issues of Fact.*

The State makes great hay of two affidavits filed in the district court which it touts as "uncontroverted," Resp. Br. in Opp. at 3, and reproduced in an appendix to its brief in opposition. Neither affidavit contains any relevant facts at all; rather, each simply recites conclusions of law. The first (Hodges) is devoid of factual information within the affiant's knowledge, and is instead rife with rank speculation and legal conclusions. *See, e.g.*, Hodges Affidavit at R. App. 11 ("It is AFFIANT's understanding, *based on her attorney's advice*, that the Choose Life Advisory Council is to formulate merely an advisory recommendation as to the disbursement of the [Choose Life] funds to recipients, that the Louisiana Legislature will take such advisory recommendation into consideration, but that it is only the Louisiana Legislature which has the discretion to make a final decision, in the act of appropriations applicable to such funds, as to the precise disposition of such funds and how they are to be disbursed.")

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[2] The State's entire discussion of *Hibbs* is confined to one ten-line paragraph. *See* Resp. Br. in Opp. at 13-14.

(emphasis added). It was properly accorded no weight by the district court.

The second affidavit (Fritz) was submitted in support of a stay pending appeal *after* the district court granted summary judgment to Plaintiffs and permanently enjoined Louisiana's special license plate scheme. It contains certain details about the prices charged for various Louisiana special license plates (all of which is contained in the statutes establishing these license plates). It repeatedly refers to these charges as "special fees," R. App. 12, 13, 14, and then announces the legal conclusions that these "special fees" are "taxes levied by the Louisiana Legislature" and that the district court's injunction "has changed the system of taxes that the Louisiana Legislature has established." R. App. 15. It is inappropriate for any court to give credence to these contradictory, self-serving conclusions of law couched as factual knowledge of an affiant.[3]

The State wrongly exploits these affidavits to play fast and loose with the history of the proceedings in this case and to impugn Petitioners' honesty. For example, the State asserts that Petitioners omitted reference to the fact that the district court ruled in favor of Petitioners on a motion for summary judgment. Resp. Br. in Opp. at 2. But this procedural fact is duly recounted on page 5 of the Petition. The State also impugns the district court judge, asserting that in granting summary judgment for Petitioners, the district

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[3] The contradictions contained in the Fritz affidavit are compounded by the current Louisiana Department of Public Safety website, which contains an order form for special license plates, http://omv.dps.state.la.us/Special%20Plates/SpecialPlates2.asp, and announces that "Prices subject to change without notice. Quotes given are non-binding." http://omv.dps.state.la.us/Special%20Plates/SpecialPlates1.asp. The Court may take judicial notice of these web pages, *Denius v. Dunlap*, 303 F.3d 919, 926-27 (7th Cir. 2003), which are reproduced in an appendix to this brief for the Court's convenience.

court ignored factual disputes contained in the Hodges and Fritz affidavits. Resp. Br. in Opp. at 2. But the Fritz affidavit was not even filed until *after* summary judgment was granted. And of course the district court was free to discount the entire Hodges affidavit, which is simply a sworn version of the legal arguments the State made in favor of its argument that the special license plates are government speech.[4] The State now perpetuates this effort by seeking to bootstrap its legal arguments in this Court into "a matter of fact," Resp. Br. in Opp.at 2, by citing these very affidavits. More importantly, both affidavits are simply a smokescreen and distraction from the State's utter failure to present coherent arguments about the factors the Court considers in deciding whether to exercise its certiorari jurisdiction.

2. *The State's Contention that Special License Plates Are Pure Government Speech Does Not Undermine the Importance of the Question Presented About the TIA.*

The State's Brief in Opposition is largely devoted to an argument that Louisiana's special license plate scheme is purely government speech and hence exempt from First Amendment scrutiny. *See* Resp. Br. in Opp. at 5-7, 15-20. This argument was rejected by the district court, *Henderson*, 265 F. Supp. 2d 699, 713-17 (E.D. La. 2003) (A-39-47), and not reached by the court of appeals in view of its holding that the TIA ousted federal jurisdiction in this case. To the extent that the State makes this argument in order to suggest that the TIA holding of the court of appeals does not prevent direct federal review of an important constitutional question, the

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[4] The State's contention, moreover, that it has never invited private speakers to express themselves on Louisiana special license plates is directly contradicted by the Louisiana government web site of Respondent Stalder's department. That website announces "This site allows you to view Special Plates and calculate the cost to convert from your current plate to a Special plate." http://omv.dps.state.la.us/Special%20Plates/SpecialPlates1.asp.

State is simply wrong. Only one divided court -- the Sixth Circuit in *Bredesen* -- has held that special license plates constitute pure government speech. Numerous federal judges and courts have taken the opposing view, finding that special license plates contain enough elements of private speech on government property to require First Amendment scrutiny, including, specifically, viewpoint neutrality. *See, e.g., Sons of Confederate Veterans*, 305 F.3d at 242 (Wilkinson, C.J., concurring in denial of rehearing en banc) ("free speech values cannot help but be implicated" by Virginia special license plate); *id.* at 243 (Williams, J., concurring in denial of rehearing en banc) (expressly rejecting suggestion that Virginia special license plate constitutes "pure government speech"); *id.* at 247 (Luttig, J., respecting denial of rehearing en banc) ("fair to assume that . . . government will be forbidden from engaging in viewpoint discrimination," even assuming that message on special license plate is "hybrid" of government and private speech). The question whether such license plates constitute a forum subject to the First Amendment's requirement of viewpoint neutrality is indeed one as to which there is also a split in the Circuits,[5] and a petition for certiorari in *Bredesen* (No. 05-1389) is pending in this Court to resolve this division.[6]

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[5] The split is between the Sixth Circuit in *Bredesen*, and the Fourth Circuit in *Planned Parenthood of S.C. v. Rose*, 361 F.3d 786 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005), which rejected the argument that a "Choose Life" license plate was government speech, instead holding that it was unconstitutional as impermissible viewpoint discrimination in a forum for speech.

[6] If this Court grants the petition in *Bredesen*, the resolution of the question presented there will control the merits of Petitioners' First Amendment claim. But Petitioners here must first obtain relief from the Fifth Circuit's TIA holding, and the Court should grant this Petition if it grants the *Bredesen* petition so that Petitioners here can vindicate their federal constitutional claims in fedeeral court.

The State's effort to minimize the importance of the constitutional question skirted by the Fifth Circuit by its extremely broad reading of the TIA is thus unavailing. *See Henderson v. Stalder*, 434 F.3d 352, 357 (5th Cir. 2005) (Higginbotham, J., dissenting from denial of rehearing *en banc*) (criticizing court's "'expansive reading' of 'tax'" under the TIA as an "aggressive run with the statute" which "create[s] a side door for federal judges determined to avoid a constitutional question") (A-83).

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

SIMON HELLER
(Counsel of Record)
PRISCILLA J. SMITH
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3600

WILLIAM E. RITTENBERG
Rittenberg & Samuel, L.L.C.
715 Girod St., Ste. 200
New Orleans, LA 70130
(504) 524-5555

Counsel for Petitioners

Dated May 8, 2006.

APPENDIX

Louisiana Special Plate Inq

This site allows you to view Special Plates and calculate the cost to convert fr your current plate to a Special plate.

- Please be sure that you have properly titled and registered the vehicle in your name.
- Have your current registration available to enter and verify vehicle information
- Certain Special Plates have specific qualifications and eligibility requirements must be met.
- Special Plates can be issued to automobiles, trucks up to 10,000 lbs., and priv buses (motor homes). Some Special Plates are also available for issuance to motorcycles.
- Special plate fees vary.
- Special plate fees calculated on this site are valid for regular license plates on
- Click here to View the locations where you may purchase Special Plates. To contact the Specialized Plate and Title Unit you may call (225) 925-6371 or ca toll-free number 1-877-368-5463 for assistance.
- DISCLAIMER: Prices subject to change without notice. Quotes given are non-binding.

Continue

ExpressLane Department of Public

Military Honor Plate Inquiry
- Fees

Help
- OMV Home
- DPS Home

Feedback
- Survey
- Contact Us

Fee Calculation for Special Plates is a simple 5-step process

1. Enter your license plate number as shown on your current registration cer and click the "Submit" button
2. Select the Special plate you would like to order
3. Click the "Ordering Details" button for instructions and eligibility requireme
4. Fill in order form and print.
5. Mail in order form, documents specified, and a check for amount required

Enter your license plate number below:

Submit

ExpressLane Department of Public